STATE OF MICHIGAN

COURT OF APPEALS

MAY R. SEDELMAIER and JOHN SEDELMAIER,

Plaintiffs-Appellants,

and

BLUE CROSS & BLUE SHIELD,

Intervening Plaintiff,

v

RAFAEL DE LOS SANTOS, M.D.,

Defendant-Appellee,

and

INGHAM MEDICAL CENTER, d/b/a MICHIGAN AFFILIATED HEALTH CARE SYSTEM, INC.,

Defendant.

UNPUBLISHED
June 17, 1997

No. 191717
Ingham Circuit Court
LC No. 94-077971-NH

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order summarily dismissing defendant Rafael De Los Santos, M.D., from this medical malpractice action on the basis of the governmental immunity privilege set forth in MCL 691.1407(2); MSA 3.996(107)(2). We affirm.

Defendant, a professor at Michigan State University (MSU), performed surgery on plaintiff May Sedelmaier (hereinafter plaintiff) in 1990 after she was referred to him by her family physician. In 1992,

plaintiff was again referred to defendant by her family physician. She contacted defendant and met with him in his office at the Ingham Medical Center. Defendant thereafter scheduled her for surgery. Plaintiff authorized the staff of Ingham Medical Center and, specifically, defendant and his assistants, to perform her surgery. Apparently, two residents from MSU assisted defendant in performing the surgery. One week later, plaintiff underwent a second surgery because of complications arising from the first operation. Defendant was again assisted by a resident from MSU. A third surgery was performed later in 1992 as a result of further complications.

Plaintiff thereafter filed a lawsuit alleging medical malpractice arising out of the 1992 surgeries. Defendant filed a motion for summary disposition, claiming that he was entitled to governmental immunity pursuant to MCL 691.1407(2); MSA 3.996(107)(2), because he was employed by a governmental agency (MSU), which was engaged in a governmental function of teaching medical science. Plaintiff opposed the motion stating that she did not know that defendant was a professor at MSU, that she did not know that he planned to utilize MSU residents in her care and treatment, and that she went to defendant on referral from her family physician, not because he was a professor. The court granted defendant's motion.

A motion for summary disposition pursuant to MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such material is supplied, the trial court must consider it. *Id*. Otherwise, the trial court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. *Turner v Mercy Hosp & Health Services of Detroit*, 210 Mich App 345; 533 NW2d 365 (1995). This Court reviews a summary disposition determination de novo as a question of law. *Id*.

Plaintiffs first argue that § 7 of the governmental immunity from tort liability act, MCL 691.1407; MSA 3.996(107) violates the Equal Protection Clause. This argument was addressed and rejected in *Vargo v Sauer*, 215 Mich App 389; 547 NW2d 40 (1996), lv pending. We are bound to follow *Vargo* pursuant to Administrative Order No. 1996-6.

Plaintiffs also argue that MSU was operating Ingham Medical Center and, therefore, MSU and its agents, including defendant, should be divested of governmental immunity pursuant to § 7(4). We disagree. The operation of a residency program does not constitute the owning or operating of a hospital or facility as defined in § 7(4). See *Vargo, supra* at 401, where this Court held that a department within a hospital does not constitute a "hospital" or "facility" within the statutory definition.

Finally, plaintiffs argue that defendant is not entitled to governmental immunity because he does not satisfy the requirements set forth in § 7(2), which provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer action on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a

> governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or volunteer while acting on behalf of the governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [MCL 691.1407(2); MSA 3.996(107)(2).]

Plaintiff asserts that defendant was not engaged in a governmental function when he operated on her with the assistance of resident surgeons, whom he was teaching and assisting. We disagree. In *Vargo, supra* at 399, this Court specifically ruled that training medical residents at a private hospital is part of the governmental function of the MSU College of Human Medicine.

Plaintiff also contends that defendant is not entitled to governmental immunity because he was not acting within the scope of his authority when he undertook plaintiff's care and treatment. We disagree.

In *Vargo,* this Court analyzed several factors in determining whether the defendant was acting within the scope of his authority. Specifically, the Court looked at the defendant's position with the governmental agency, his involvement with the private hospital, where he worked, how he was paid, and whether he was involved in any private practice outside the scope of his employment with MSU. *Id*. at 399-400. Here, defendant was an MSU professor and was involved in a program run by MSU and Ingham Medical Center. He provided clinical care at MSU-Surgical Services located at Ingham Medical Center. He was not paid by Ingham Medical Center or by plaintiff's insurer for his professional services. Rather, plaintiff's insurer paid MSU for those services. In addition, defendant has no private practice outside of his involvement with MSU's clinical practice.

Plaintiff argues that she did not enter into a physician-patient relationship with defendant on the basis of his professorship with MSU, she was unaware of defendant's status as an MSU professor, and did not know that he was going to unilaterally decide to allow residents to participate in her surgery. These claims, even if true, do not take this case outside of *Vargo* and are not proper grounds for reversal. Indeed, the governmental immunity statute does not take into consideration the perspective of the injured person. There is no question that defendant was acting or reasonably believed he was acting within the scope of his authority as a medical professor when he operated on plaintiff. Therefore, the trial court properly granted summary disposition.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor